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Supreme Court, U.S.
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No. 97-53

In The

Supreme Court of the United States

October Term, 1996

JANE M. ROBERTS, Guardian for Wanda Y. Johnson,

Petitioner,

v.

GALEN OF VIRGINIA, INC.,
d/b/a University of Louisville Hospital,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Petitioner seeks this Court's review based on the following framed questions:

Whether a claim under the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd, requires proof of an improper motive as a prerequisite for recovery.

Whether, if proof of an improper motive is a prerequisite for recovery under the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd, a causal relationship must exist between the hospital employee possessing the alleged improper motive and the discharge of the unstable patient.

Whether, under Kentucky law, resident physicians not directly employed by the hospital, are the hospital's ostensible agents whose negligence can be attributed to the hospital.

PARTIES TO THE PROCEEDING

The parties to this proceeding are as named in the Petition and this Brief in Opposition.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Galen of Virginia, Inc. d/b/a University of Louisville Hospital ("Humana"), respectfully requests that the Court deny the Petition for Writ of Certiorari seeking review of the April 9, 1997, Opinion Affirming rendered by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Opinion Affirming of the United States District Court, Western District of Kentucky, at Louisville, is reprinted at Appendix A1 to the Petition. The Memorandum Opinions of the United States District Court, Western District of Kentucky, at Louisville, are reprinted at Appendix A26 and A48 to the Petition.

JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Statute involved in this case is the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd, reprinted at Appendix A55 to the Petition.

STATEMENT OF THE CASE

On August 30, 1993, Petitioner, as guardian for Wanda Y. Johnson ("Johnson"), filed this action in the United States District Court for the Western District of Kentucky under the Emergency Medical Treatment and Active Labor Act ("EMTALA"), 42 U.S.C. § 1395dd (Supp. 1996), alleging that Humana Hospital University of Louisville ("Humana") failed to comply with EMTALA in the transfer of Johnson to a skilled nursing facility. Johnson also alleged that Humana should be liable for negligence under state-law for the acts of the surgical residents responsible for Johnson's care.

Johnson was hospitalized at Humana on May 19, 1992 after sustaining injuries in a motor vehicle accident. Johnson remained hospitalized at Humana for over two months during which time she experienced numerous complications associated with immobility and trauma. During the last few weeks of Johnson's hospitalization, her physicians – who are not employed by Humana – determined that her condition had stabilized, and that Johnson was in need of long term care and rehabilitation in a skilled nursing facility.

Placing Johnson was difficult because of a long-standing shortage of nursing home beds in Kentucky. Johnson's husband, Michael Johnson, was informed of the situation by Humana's social workers and verbally authorized Humana to look for appropriate facilities in neighboring Indiana.

On July 22, 1992, a representative from Crestview Health Care Center ("Crestview") in Indianapolis, Indiana, came to Humana and evaluated Johnson for placement in that facility. Crestview represented that it provided skilled nursing care, physical, speech and occupational therapy services, and would be able to do so for Johnson. Crestview's admissions team reviewed Johnson's records and accepted her for admission. Johnson was transferred to Crestview on July 24, 1992.

On the day before Johnson's transfer, she developed the symptoms of a urinary tract infection, including an elevated temperature. Johnson's physicians treated the suspected infection with an antibiotic and although Johnson's temperature remained elevated on the day of her discharge, Johnson's physicians were aware of her condition and did not feel her transfer to a skilled nursing facility was contraindicated.

The physicians involved in Johnson's care attested that Johnson's condition was sufficiently stable to warrant discharge. These physicians further attested that the decision to discharge Johnson was a medical one and that her financial condition was not a consideration. Johnson brought forth no evidence suggesting that Johnson's treating physicians were aware of her financial condition.

Johnson also alleged that the hospital violated several policies and procedures pertaining to the transfer or discharge of patients. Humana offered proof that the policies Johnson referred to either did not apply to her or were substantially complied with.

Following Johnson's transfer from Humana, and approximately two hours after her arrival at Crestview,

Crestview's Director of Nursing assessed Johnson's condition. She believed that Johnson's condition was sufficiently stable to be treated at Crestview. Johnson's admitting physician at Crestview felt that Johnson was stable upon arrival to Crestview based on the information he received from Crestview's nursing staff.

Despite orders that Johnson's vital signs had to be checked every four hours, the Crestview personnel did not reassess her until 15 1/2 hours following her admission – at which time a significant deterioration in Johnson's condition was discovered. Johnson was transferred to an Indianapolis hospital where she was treated by John Stuy, M.D. ("Dr. Stuy"). According to Dr. Stuy, Johnson's tracheostomy tube should have been suctioned by Crestview's nursing staff at least every four hours or more often as needed. Failure to suction a patient can result in aspiration of fluids or mucous plugging which can lead to pneumonia. Yet, Crestview's records show that Johnson was not suctioned during the last eleven hours of her stay at Crestview. Dr. Stuy, who reviewed Johnson's records from Humana, acknowledged that Johnson's condition changed significantly the day after she was transferred from Humana.

The District Court initially denied Humana's motion for summary judgment on the EMTALA claim because it found there was a genuine issue of material fact as to whether Johnson was stabilized before she was transferred and because there was a genuine issue of material fact as to whether Humana acted with an improper motive. Regarding the state-law negligence claim, the District court held that Humana could not be liable for the actions of the surgical residents because they were

not ostensible agents of the hospital. Humana moved for reconsideration of the EMTALA claim. On reconsideration, the District Court held that, despite the existence of genuine issues of material fact as to stabilization and improper motive, Johnson failed to offer any proof that "either the medical opinion that Johnson was stable or the decision to authorize her transfer was caused by an improper motive." Thus, the District Court granted Human's motion for summary judgment on the EMTALA claim. Johnson appealed the dispositions of the EMTALA claim and the District court's conclusion that the residents were not ostensible agents of Humana.

On appeal, the Sixth Circuit held that proof of an improper motive is a prerequisite to recovery under EMTALA. Although Johnson alleged that a Humana social worker received pressure from Humana administration to make discharge arrangements for Johnson because she lacked insurance, Johnson brought forth no evidence that her treating physicians – who alone had the authority to discharge Johnson – acted with an improper motive in ordering her discharged. Accordingly, the Sixth Circuit held that the District Court properly granted summary judgment on Johnson's EMTALA claim because she failed to show any evidence of a causal relation between the hospital employee allegedly possessing the improper motive and Johnson's discharge. The Sixth Circuit further held that the District court properly concluded that the surgical residents responsible for Johnson's care were not ostensible agents of Humana.

REASONS FOR DENYING THE PETITION

Johnson attempts to assert a medical negligence action under the guise of an alleged EMTALA violation, which is contrary to the purpose of the statute. Congress's sole purpose in enacting EMTALA was to deal with the problem of patient "dumping", i.e., refusing for non-medical reasons to treat or inappropriately transferring patients presenting for care in hospital emergency departments. EMTALA is not a substitute for state-law malpractice actions, nor does it guarantee proper diagnosis or provide a federal remedy for medical negligence. The circuits are uniformly in accord on the need to distinguish EMTALA claims from state negligence and medical malpractice claims. *See, e.g., Correa v. Hospital San Francisco*, 69 F.3d 1184, 1192 (1st Cir. 1995) ("EMTALA does not create a cause of action for federal malpractice."); *Power v. Arlington Hosp. Ass'n*, 42 F.3d 851, 856 (4th Cir. 1994) ("EMTALA is not a substitute for state law malpractice actions, and was not intended to guarantee proper diagnosis or to provide a federal remedy for misdiagnosis or medical negligence."); *Gatewood v. Washington Healthcare Corp.*, 933 F.2d 1037, 1041 (D.C. Cir. 1991) (EMTALA is not intended "to ensure each emergency room patient a correct diagnosis, but rather to ensure that each is accorded the same level of treatment regularly provided to patients in similar medical circumstances.")

The Sixth Circuit has held that a showing of improper motive is a prerequisite to recovery under EMTALA. *Roberts v. Galen of Virginia, Inc.*, 111 F.3d 405 (6th Cir. 1997); *Clelend v. Bronson Health Care Group*, 917 F.2d 266 (6th Cir. 1990). Absent a showing of improper

motive, EMTALA becomes "nothing more than a federal remedy for medical malpractice." *Roberts*, 111 F.3d at 410.

Johnson argues that this Court should issue a Writ of Certiorari in this case because the Sixth Circuit's interpretation of EMTALA is clearly divergent from other circuit courts that have construed EMTALA. The Courts of Appeal for the District of Columbia Circuit, the First Circuit, the Fourth Circuit, and the Eighth Circuit have adopted a "disparate treatment" test that does not, on its face, require a showing of improper motive. Instead, courts using the disparate treatment analysis examine whether an EMTALA claimant received treatment different from other "similarly situated patients." Johnson suggests that an EMTALA claimant can prevail under this test simply by showing that a hospital did not conform to its policies and procedures in treating a patient.

In actuality, improper motive or bias is implicit within the disparate treatment analysis, and the distinction between the tests utilized by the circuit courts is one of semantics. A recent Fourth Circuit case is illustrative. In *Vickers v. Nash General Hosp.*, 78 F.3d 139, 144 (4th Cir. 1996), the Fourth Circuit held that "EMTALA is implicated only when individuals who are **perceived** to have the same medical condition receive disparate treatment; it is not implicated whenever individuals who turn out **in fact** to have had the same condition receive disparate treatment." (Emphasis in original.) The court emphasized that:

> In fact, not only does treatment based on diagnostic medical judgment not violate the Act, it is precisely what EMTALA hoped to achieve – handling of patients according to an assessment

> of their medical needs, without regard to extraneous considerations such as their ability to pay.

Id.

The *Vickers* court noted that the physician had treated plaintiff for the condition he perceived – mainly, a scalp laceration – and that he did not believe testing for intracranial injury was medically necessary. Accordingly, the hospital did not violate EMTALA because the seriousness of the condition was not "actually perceived," although it was possible that the physician may have been negligent. *Id.* at 144-45. Regarding the claim for failure to stabilize, the *Vickers* court stated that " '[a]nalysis by hindsight . . . is not sufficient to impose liability under EMTALA.' " *Id.* at 145 (citing *Baber v. Hospital Corp.*, 977 F.2d 872, 883 (4th Cir. 1992)). Further, that "a hospital must actually perceive the seriousness of the medical condition and nevertheless fail to act to stabilize it." *Vickers*, 78 F.3d at 145. Clearly, failure to act in the face of a recognized serious medical condition implicates improper motive and effectively limits the statute's application to only those cases that involve bias or discrimination.

Likewise, the Eighth Circuit acknowledged that something more than a deviation from a hospital's normal screening process is required to prevail under EMTALA. *Summers v. Baptist Medical Center Arkadelphia*, 91 F.3d 1132, 1138 (8th Cir. 1996). The plaintiff in *Summers* fell from a deer stand while hunting and claimed that he complained of pain and heard popping noises in his chest while being examined in the hospital's emergency department. The physician treating the plaintiff did not recall

plaintiff complaining of chest pain or popping noises in the chest. The physician ordered x-rays of the spine, but not the chest, and determined the plaintiff was suffering from muscle spasms. Two days later, the plaintiff went to another hospital and was diagnosed with various chest fractures. The hospital conceded that patients complaining of chest pain or popping noises in their chest would normally be given a chest x-ray. *Id.* at 1135-36.

The *Summers* court admitted it had previously adopted the position that a hospital's failure to follow its procedures amounted to disparate treatment and was violative of EMTALA. *Id.* at 1338. On reflection, the court concluded that a mere allegation of non-uniform treatment "is nothing more than an accusation of negligence." *Id.* at 1139. Instead, the court held that:

> instances of 'dumping,' or improper screening of patients for a discriminatory reason, or failure to screen at all, or screening a patient differently from other patients perceived to have the same condition, all are actionable under EMTALA. But instances of negligence in the screening or diagnostic process, or of mere faulty screening, are not.

Id.

It is inconceivable that the disparate treatment test as modified by the courts in *Vickers* and *Summers* could be met absent some evidence of bias or improper motive. In fact, among the circuits that have adopted the disparate treatment analysis, only those cases involving at least circumstantial evidence of bias have been permitted to go forward. *See Correa*, 69 F.3d at 1184, 1189 (affirming jury

verdict for plaintiff where plaintiff alleged denial of treatment after the hospital viewed the patient's insurance card); *Power*, 42 F.3d at 854 (affirming jury verdict for plaintiff who was unemployed and uninsured). What possible explanation, other than bias or improper motive, can there be for a hospital's refusal to treat one patient with a perceived emergency medical condition in the same manner it would treat other patients with the same condition?

Johnson's argument that claimants in the Sixth Circuit are required to prove more than claimants elsewhere, is inaccurate. Regardless of jurisdiction, all EMTALA claimants must show that a hospital denied them screening or stabilizing treatment that patients perceived to have the same condition would have received. It is immaterial whether the test requires proof of improper motive versus proof of disparate treatment of a perceived emergency medical condition. Essentially, the same proof is required. There is no "clear divergence" among the circuits interpreting EMTALA. The only difference is the name given the analysis used. Accordingly, there is no compelling reason for this Court to issue a Writ of Certiorari in this case.

CONCLUSION

Respondent Humana respectfully requests that the Petition be denied.

Respectfully submitted,

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